

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 56

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HANS-WERNER MEIXNER

Appeal No. 2002-1850
Application No. 08/288,574

ON BRIEF¹

Before COHEN, STAAB, and OWENS, Administrative Patent Judges.
COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 through 24 and 26 through 29. Claims 37 through 40 stand withdrawn; 37 CFR 1.142(b). These claims constitute all of the claims remaining in the application.

¹ Attendance at the oral hearing set for Thursday, July 17, 2003, was waived by appellant (Paper No. 55).

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Appellant's invention pertains to a packaging envelope for the packaging of formable meat, in combination with formable meat. A basic understanding of the invention can be derived from a reading of exemplary claim 1, a copy of which appears infra.

As evidence of anticipation and obviousness, the examiner has applied the document specified below:

Korlatzki et al (Korlatzki)	4,123,589	Oct. 31, 1978
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The following rejections are before us for review.

Claims 1 through 24 and 26 through 29 stand rejected under 35 U.S.C. § 112, second paragraph, as failing to set forth the subject matter which appellant regards as the invention.

Claims 1 through 4, 6, 7, 8, 12, 15 through 24, 26, 28, and 29 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Korlatzki.

Claims 5, 9, 10, 11, 13, 14, and 27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Korlatzki.

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The full text of the examiner's rejections and response to the argument presented by appellant appears in the answer (Paper No. 48), while the complete statement of appellant's argument can be found in the main and reply briefs (Paper Nos. 47 and 51).

In the main brief (page 8), appellant states that "[a]ll the claims are to be grouped together." We understand appellant's statement as pertaining to each of the rejections on appeal. Thus, we shall appropriately select, infra, a representative claim to review for each of the rejections. With respect to the anticipation rejection, however, we find that separate arguments have been presented by appellant for claims 2 and 26. Further, based upon the specific argument addressed to the obviousness rejection (main brief, page 31), it is apparent that the claims rejected as obvious stand or fall with claim 1. It follows that in the discussion below, we shall focus upon claim 1 as to the § 112 rejection, claims 1, 2 and 26 as to the § 102(b) rejection, and claim 1 as to the § 103(a) rejection.

OPINION

In reaching our conclusion on the issues raised in this appeal, this panel of the board has carefully considered appellant's specification and claims, the applied patent, the affidavit of Hans-Werner Meixner executed January 26, 2002 (Paper No. 42), the declaration of Dr. Horst-Christian Langowski executed September 26, 1997 (attachment to Paper No. 20) and the respective viewpoints of appellant and the examiner. As a consequence of our review, we make the determinations found below.

At the outset, it is worthy of considering the background disclosure in appellant's specification (pages 2 through 4) wherein U.S. Patent No. 4,155,212 to Marchese is brought to our attention. As explained by appellant (page 2), the Marchese patent teaches elastic netting to force and press meat into an approximately round cross-sectional shape, i.e., a very great tension is applied to the meat in a radial direction by expandable rubber netting. Appellant points out (page 2) that netting is not packaging within the meaning of the present invention, but also notes that Marchese teaches various envelopes

as packaging material, e.g., monoplane material. With further reference to Marchese and then the present invention, appellant indicates (page 4) that

even if a use of elastic foil as packaging for the meat were to be made possible by modifying the packaging device, this foil is not suitable for serving as vacuum packaging as this material is not gas impermeable. Gas-impermeability is attained only in connection with a second foil serving as a gas-impermeable layer in interaction with a first elastic foil according to the invention.²

As explained by appellant (page 4), it is an object of the present invention to provide a packaging envelope which contracts in such a way that air between a commodity and the envelope is pressed out automatically.

In our review of the Marchese patent, we find that the patentee references (column 1, lines 11 through 14) the knowledge in the art of machines generally similar to a "sausage stuffer" for inserting meat into a wrapping or enveloping means (netting

² It is noted that the Korlatzki reference applied by the examiner reveals that, at the time of the present invention it was known to include a water-impermeable inner layer in a combination of films.

material). As to Marchese's invention (column 2, lines 33 through 39), a solid or net tubular envelope, of a resilient nature (automatically constricting), is positioned in telescoping relationship onto a cylindrical cartridge (Fig. 2). Additionally, the patentee points out (column 3, lines 37 through 45) that the envelope may be of any conventional nature such as "sheet, foil or netting" and normally same will be of a resilient nature and automatically constrict itself. Figure 5 of the patent shows a piece of meat with a completed envelope in position thereon (column 2, lines 29 and 30).³

We turn now to the rejections on appeal.

The §112, second paragraph, rejection

We do not sustain the rejection of claims 1 through 24 and 26 through 29 under 35 U.S.C. § 112, second paragraph, as failing

³ It appears to us that one skilled in the art would comprehend from the Marchese teaching that a resilient tubular sheet or foil that automatically constricts onto a piece of meat and conforms to the shape thereof, basically as shown in Fig. 5 of the patent, would reasonably be expected to press out the air between the meat and the tubular sheet or foil(envelope).

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to set forth the subject matter which appellant regards as the invention.

The examiner views a statement made by appellant (Paper No. 37) that the pressure of shaping meat must not exceed a maximum of 200 g/cm² of meat surface or 1.96N/cm² as indicating that the claimed invention is broader in scope than what is disclosed by the disclosure (answer, pages 3, 6, and 7). We disagree. While appellant has addressed a specific pressure limit during prosecution, the originally filed application itself does not disclose any particular pressure, critical or otherwise, for shaping meat. Thus, it does not appear to us that appellant has failed to set forth in the claims on appeal the subject matter regarded as the invention. It is for this reason that the § 112, second paragraph, rejection cannot be sustained.

The §102(b) rejection

We sustain the rejection of claim 1 under 35 U.S.C. § 102(b) as being anticipated by Korlatzki. It follows that we likewise sustain the anticipation rejection of claims 3, 4, 6, 7, 8, 12, 15 through 24, 28, and 29 since these claims stand or fall with

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claim 1 as earlier indicated. We do not, however, sustain the anticipation rejection of claims 2 and 26.

Appellant's sole independent claim 1 on appeal reads as follows:

Packaging envelope for the packaging of formable meat, in combination with formable meat, comprising,

(a) at least two layers of superimposed plastic foils, of which at least one plastic foil is elastic and the other plastic foil is at least virtually gas-impermeable;

(b) said packaging envelope is permanently elastic;

(c) said packaging envelope stretches immediately before and upon the placement of said formable meat in the elastic envelope;

(d) said packaging envelope spontaneously contracts in its cross-section after placement of the meat and automatically forces out air present between the packaging envelope and the meat; and

(e) said packaging envelope forces the formable meat into a nearly circular cross-section shape after it is placed in the packaging envelope.

In our opinion, the packaging envelope in combination with formable meat, as set forth in appellant's claim 1, reads on the teaching of Korlatzki.

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Claim 1 requires "formable meat". This term did not appear in the originally filed application, but was subsequently added to the claims (Paper No. 37).

The underlying original specification discusses "meat or other objects" (page 1), "commodity" and "contents" (page 4), "foods" (page 5), "joint of meat" (pages 7 and 8), "meat, any objects" (page 9), "insulating materials such as glass wool and the like or litter for domestic pets" (page 10), "meat" (original claim 1), and "foods, in particular meat" (original summary or abstract). Further, the specification teaches the shaping of the contents into a round (circular) cross section (page 5).

In light of the underlying disclosure, it is clear to this panel of the board that the term "formable meat" broadly denotes any type of meat that can be shaped. As such, it is quite clear to us that appellant's "formable meat" reads on the "sausage meat" expressly taught by Korlatzki (column 6, lines 26 and 27).

Claim 1 recites a packaging envelope that is "permanently elastic". This term did not appear in the original disclosure. However, it appears to be based upon the recitation

(specification, page 5) that genuine elasticity (originally genuine flexibility) of the packaging material results in radial tension on the contents causing a shaping of the contents, with the radial tension being retained in the long term, i.e., throughout a storage period.

When we consider the Korlatzki teaching as a whole, it is clear to this panel of the board that the claimed recitation of a permanently elastic packaging envelope is readable thereon. First, we recognize that appellant does acknowledge that the Korlatzki envelope would undergo "slight automatic restoration after the insertion of the meat" (main brief, page 36) vis-a-vis the "frozen elasticity" recitation in Korlatzki discussed by appellant (main brief, page 18). It follows that the so-called frozen elasticity of Korlatzki (MANUFACTURE OF A BIAXIALY STRETCHED, ONE LAYER SAUSAGE CASING; column 10, line 21 through column 11, line 22) would not entirely destroy elasticity; thus, elasticity is permanent, albeit of a lesser degree, as acknowledged by appellant. Nevertheless, the frozen elasticity issue concerning the Korlatzki teaching only arises relative to the application of optional biaxially stretching (column 5, lines 27, 28, and column 6, lines 1 through 3). Setting aside the

optional biaxially stretching step, the Korlatzki reference, like appellant (specification, page 9; Fig. 8a), expressly teaches a multi-layer casing of polyurethane (highly elastic) and PVDC (gas impermeable) (column 3, lines 2 through 6, and column 5, lines 12 through 17 and 40 through 52) which lies taught and absolutely wrinkle-free against food material content (column 6, lines 34 through 36).

In light of the above findings relative to the materials and characteristics of the multi-layer casing of Korlatzki, we determine that the Korlatzki patent responds to all features of the packaging envelope in combination with formable meat set forth in appellant's claim 1, i.e., the casing of Korlatzki is capable of and would be expected to stretch immediately before and upon placement of formable meat therein, the casing would spontaneously contract after placement of meat and automatically force out air between the casing and the meat, and the casing would force the formable meat into a nearly circular cross-section shape.

It is for the above reasons that the anticipation rejection of claim 1 is sustained.

We have of course fully assessed the argument advanced by appellant (main brief, pages 10 through 26) relative to the rejection of claim 1 under 35 U.S.C. § 102(b). However, we are not convinced thereby that the examiner erred in making this rejection and concluding identity between the claimed subject matter and the "final product" of Korlatzki (answer, pages 8 and 9). For the reasons given earlier, we do not share appellant's point of view (reply brief, page 5) that the term (formable) meat in claim 1 would be understood to refer to "solid animal flesh as such" or "whole pieces of meat" (Meixner affidavit, section II). Contrary to the view advocated by appellant that the concept of a permanently elastic film is completely contrary to the teachings of Korlatzki (main brief, page 15), we pointed out above that the basic highly elastic multi-layer teaching of Korlatzki, setting aside the optional biaxially stretching feature, does address a permanently elastic film, and appellant has not proven otherwise. The Meixner affidavit (Sections V. and VI.) focuses on frozen elasticity, the consequence of the application of optional biaxially stretching, and thus fails to address the basic highly elastic multi-layer teaching of Korlatzki. Similarly, declarant Langowski's focus on effects (frozen elastic properties) of optional biaxially stretching (Sections 2 and 3) does not take

into account the basic highly elastic multi-layer teaching of Korlatzki. We note that the comparison made by declarant Langowski (Section 4 and Attachment) did not involve the closest prior art (the materials of Korlatzki).

Turning now to the anticipation rejection of claims 2 and 26, we are in basic agreement with appellant (main brief, page 27) that the specific properties set forth in these claims cannot be fairly determined as inherent in the multi-layer casing of Korlatzki, i.e., there is no reasonable basis for concluding, with certainty, that the now claimed specific properties are, in fact, present and an inherent characteristic of the Korlatzki casing. For the foregoing reason, the anticipation rejection of claims 2 and 26 is not sound and cannot be sustained.⁴

The §103(a) rejection

We sustain the rejection of claims 5, 9, 10, 11, 13, 14, and 27 under 35 U.S.C. § 103(a) as being unpatentable over Korlatzki.

⁴ An obviousness assessment relative to claims 2 and 26 is not before us.

Appellant's specific argument relative to the obviousness rejection (main brief, page 31), i.e., there is nothing in the prior art reference to *Korlatzki* which will teach, suggest, or disclose the claimed concept of a packaging envelope which is permanently elastic and which is useful for the packaging of meat, addresses the content of independent claim 1 and not the specific limitations of the individual claims in the obviousness rejection. We determined that the subject matter of claim 1 was not patentable over the *Korlatzki* patent, supra. It follows that the rejection of claims 5, 9, 10, 11, 13, 14, and 27 under 35 U.S.C. § 103(a) is sustained since these claims stand or fall with claim 1, as earlier pointed out. The content and weight of the Meixner affidavit and the Langowski declaration were earlier assessed relative to the *Korlatzki* patent and found not to be persuasive of the patentability of claim 1.

In summary, this panel of the board has not sustained the § 112 rejection, has sustained the rejection of claims 1, 3, 4, 6, 7, 8, 12, 15 through 24, 28 and 29 under § 102(b), but has not sustained the rejection of claims 2 and 26 under § 102(b), and has sustained the § 103(a) rejection.

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The decision of the examiner is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	
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)	BOARD OF PATENT
LAWRENCE J. STAAB)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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